

The Clause

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A QUARTERLY PUBLICATION OF THE BOARDS OF CONTRACT APPEALS BAR ASSOCIATION



President's Column

Marcia Madsen

MORGAN, LEWIS &
BOCKIUS

A number of significant events have occurred since the last issue.

The Board of Governors met in January and discussed activities that could be taken by the Association for the benefit of its members in the short term. Among other things, we concluded that efforts should be taken to revitalize the Trial Practice Course, and that the BCA Bar Association should actively participate in sponsorship of that course with the ABA Public Contract Law Section. Cooperative efforts are now underway with the ABA to pin down a date for the course, revise the materials and obtain commitments from judges and speakers. In the next issue, we hope to be able to report on the actual scheduling of the course.

In addition, the Board of Governors determined that it would be desirable to initiate a series of "Focus Groups," consisting of a limited number of experienced practitioners and Board judges to review (and hopefully improve) practice before the Boards. These sessions will be organized by the Practice and Procedures Committee. The first one, held on March 30th, concerned discovery issues. Additional sessions will be scheduled throughout the year. Please notify Carl Peckinpugh if you are interested in participating (see his column at p. 10).



Along with the Focus Groups, we are also working for a closer liaison with the BCA Judges Association (BCAJA). At the BCAJA Annual Seminar on April 20th, several BCA Bar members will be participating on two panels: Effective Use and Presentation of Demonstration (continued on page 12)



Editor's Corner

Peter A. McDonald

DELOITTE & TOUCHE

We got lots of letters about the last issue, many favorable but one unfavorable. The lone unfavorable letter stated,

in pertinent part:

Dear Sirs:

I think Pete McDonald did a pretty sorry job with "The Clause." He is such a jerk. Putting the pictures in the newsletter was not a good idea in his case. And I never liked him anyway. They really ought to bring the former editor back. He was so much better, and everybody liked him. So there.



(Name withheld by request.)

Oles, Morrison & Rinker
Seattle, Washington

On the other hand, the typical favorable letter sounded like this:

Dear Sirs:

I think Pete McDonald did a FABULOUSLY GREAT job with "The Clause." Why, he did so well that the BCA Bar

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Association ought to buy him a video camera. I know the kind he wants to get and it's on sale this month at Circuit City. They only have three of them left so you better hurry.

(Unsigned)
Deloitte & Touche
Washington, D.C.

What can I say, ladies and gentlemen, to unsolicited letters of support like that? (!)

Anyway, our membership continues to steadily grow (see the list of new members). To provide a greater benefit to our expanding association, we are thinking of adding a few short features to "The Clause." One would be a "Who's News" column, which would announce moves, changes of employment or promotions so that members could keep their Directories current. Those of you who would like such an announcement to appear in the next issue should send me a short note.

Please keep us informed of any change of address. In the mailing of the last issue, we only had eight undeliverable returns. We also

did well with the articles not accepted for publication: "Swamp Creature Appears Pro Sel," "Giant Tomato Talks!," and "Navy Position Found Substantially Justified!"

For forward planning purposes, the next issue is planned for July, the annual meeting will be held in October, the last issue of the year should be out in November, and the 1994 Directory will be compiled and mailed in December. Remember, the 1994 Directory will publish each member's phone and fax numbers, and this information will be requested on the membership renewal forms later this year. On that point, I encourage all of you to support our membership growth by signing up a new member.

Interview with...

Marshal J. Doke, Jr.

McKENNA & CUNEO

[EDITOR'S NOTE: AS ONE OF THE FOREMOST PRACTITIONERS OF GOVERNMENT CONTRACT LAW TODAY AND THE FIRST PRESIDENT OF THE BCA BAR ASSOCIATION, MARSHALL DOKE NEEDS NO INTRODUCTION.]

What was the government contracts practice like when you began?

Government contract law as a separate practice area was just beginning. There were only a couple of law firms and a few individual practitioners developing this specialty in private practice. When I started in the early 1960s, there was a lot more competitive bidding, which then was called formal advertising. There was constant Congressional pressure every year to reduce the number of "negotiated" contracts, so you just did not see negotiated contracts for janitorial services, laundry services, guard services, or simple construction contracts like we have today. In the disputes area, the practice was much more informal. One Court of Claims judge even characterized the boards of contract appeal's pro-

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...by allowing the technical factors to exceed price in relative weight, the minimum needs doctrine virtually has been forgotten.

cedures as "the continuation of negotiations." The case law in both procedural and substantive areas was much less mature. For example, the constructive change doctrine was just beginning to develop.

What are the most important trends in the government contracts practice you have seen develop over the years?

The most important trend, I believe, has been the increased regulation of the contractor's business through contract requirements. Our Government now "regulates" government contractors through cost principles, cost accounting standards, sub-contract requirements, and system approvals such as accounting, quality control and purchasing, more than even socialist governments in Europe regulate government-owned businesses. The lawyer's work today deals far more with "compliance" than it does with performing the service or making the product. The other major trend has been the formalization and complication of the disputes resolution system, particularly after the Contract Disputes Act of 1978. When I began practicing in this area, "discovery" almost was never allowed before the boards of contract appeals. I would not want to return to the earlier days that some called "trial by ambush," but I do believe those days made the lawyer's skills and techniques more important in the resolution of the dispute.

You mentioned the Contract Disputes Act (CDA). Did anyone anticipate or predict all the problems the CDA would cause?

No. In the "negotiations" that led to the Act, however, there were a number of us who thought that too much was given up in the pro-

cess. One of the controversial issues at the time was the date interest would begin to run; i.e., when the cause of action accrued or when the claim was submitted. The big "tradeoff" was giving the Government the right to appeal adverse decisions of boards of contract appeals in exchange for giving contractors the election to go directly to the then Court of Claims after an adverse decision under the Disputes Clause. Admiral Rickover persuaded Congress at the last minute to put in the certification requirement. However, no one dreamed that the certification requirement would cause the jurisdictional problem we have had affecting the validity of an appeal.

In your opinion, what changes in the practice of government contract law have been good?

One good trend has been the increased recognition over the years that the field of government contracts is a highly specialized area not only of law but also in management and contract administration. There is a much greater recognition of the need for professionalism in both government and contractor personnel. Another good trend has been the Comptroller General's willingness to "police" the system to a greater degree than in earlier years. The bid protest system can be highly efficient and cost effective in protecting the integrity of a competitive system, but the system requires that remedies be given in appropriate cases because procuring agencies and competitors must recognize that the rules of competition will be enforced. Another good trend has been the greater independence of the boards of contract appeals administrative judges. When I began, there were military officers who were members of the ASBCA, and that did not give the appearance of impartiality to contractors. There is still a problem because the independence mandated by the Contract



Disputes Act has not been implemented, but it is much better than it used to be.

What changes do you believe have not been good?

The worst trend, I think, has been the increased use of negotiated procurements with inadequate guidance in the regulations for the use of evaluation factors. In many negotiated procurements, price is not even weighted 50 percent, and it often is weighted much less. Subjective evaluation factors often suggest, and undisclosed subfactors belatedly suggest to competitors, that the agency will merely award the contract to the contractor it wants. A related problem is that, by allowing the technical factors to exceed price in relative weight, the minimum needs doctrine virtually has been forgotten. For example, in a janitorial services contract, if one year of experience is all that is needed to mop floors adequately, why should the Government pay a higher price to a contractor that wins the contract by a higher technical score because its employees have three years' experience? Even financial condition, which normally is used only for responsibility determinations, now is being used as an evaluation factor. If a net worth of \$1 million is ad-

equate to perform the contract, why should the Government pay a price premium for a higher technical rating merely because the successful offeror has a net worth of \$10 million?

What advice would you give to a new attorney just beginning to practice government contract law?

My first recommendation would be to begin a disciplined CLE self-study program with a goal of staying current in all new developments. There are so many, and frequent, new developments in the laws, regulations, and decisions that, if you get very far behind, it is almost impossible to catch up. There is no better way to lose credibility with a client than to have contract administration people bring up new developments of which you are unaware. Second, I would recommend that the lawyer become as active as possible in one or more bar associations with government contract specialties because this participation can have tremendous educational potential. Third, I would recommend that the lawyer identify, as soon as possible, the specific areas in government contract law that he or she enjoys the most and work to become the very best practitioner in that area. If what you are doing is not really fun, keep looking until you find an area that is.

What trends do you expect to see in government contracts over the next several years?

In the near future, I believe there will be more claims and litigation as contractors see defense programs ending and recognize their inability to make up losses or costs on follow-on contracts. Over a longer period, I believe there will be a trend toward more commercial practices in government contracts. Before this can occur, however, the Government will have to focus more on paying a fair price for a product or service rather than focusing on what the contractors do with the money they receive for performing a contract. We must get away from the mind-set that the Government is paying for stock options or excessive executive salaries and think in terms of reasonableness of price paid for the product or service. We still hear

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the question: "Why should the taxpayers pay for the company president's country club bill?" The answer is that the Government should focus on paying a reasonable and competitive price for the product it buys, such as a computer or mess attendant services, and not worry about what the contractor does with the money it receives in payment for the product or service.

What do you believe are the three greatest challenges facing a government contracts practitioner today?

The greatest challenge merely is to survive in a rapidly changing market. The total dollar volume of government purchases may not decrease, but the types of products and services the Government will buy surely will change. This means that lawyers and law firms inevitably will lose many existing clients. The challenge will be to replace lost clients with new ones. Another major challenge will be to find ways to become more efficient and lower the cost for the delivery of legal services. Clients are being solicited by cut-rate "contract lawyers," and this development in today's economy is causing clients to consider a cost/quality tradeoff analysis for the performance of their legal work. Clients may not be able to afford the highest quality legal services. Another major challenge is to reduce the cost of dispute resolution. In many cases, the cost of litigation simply is prohibitive. Personally, I would rather see more effort in reducing the cost of litigation by limiting discovery, sanctioning dilatory or abusive practices, etc., rather than trying to change to alternate disputes resolution procedures.

How do you believe a government contracts attorney should respond to those challenges?

Responding to the loss of clients caused by changes in the Government's purchasing pattern is a marketing problem being faced by lawyers in all practice areas today. My view always has been that the most effective efforts in long-term client development are related to improving the quality of your work product. The

best way to get new clients is to have recommendations from satisfied ones. One way to lower the cost of legal services and litigation is to develop a work plan with the client that includes a cost/risk analysis and mutual agreement regarding the scope of internal investigation and interviews, the number of depositions to be taken, the issues to be contested, etc. Making an analogy to the old rule of thumb in purchasing that 20 percent of the parts will represent 80 percent of the cost, it may be that the lawyer and client can agree to reduce costs by eliminating some efforts in low risk areas. Another effective way to reduce cost is to use more employees of the client to do work traditionally performed by lawyers. Responding to the challenge of reducing the cost of litigation by systemic changes can best be met by participation in bar association activities.

What career accomplishments are you most proud of?

Serving on the Board of Governors of the American Bar Association and as Chairman of the ABA Section of Public Contract Law certainly have been important to me, but I guess I

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feel even better about having been selected as the second recipient of the Justinian Award given each year to a Dallas lawyer, but selected by a non-lawyer jury, for long-time civic service to the community. I feel strongly that civic service is a type of pro bono activity, and I feel honored each year to be among the past recipients attending the award ceremony.

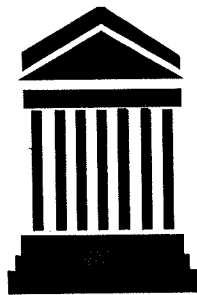
What or programs do you believe the BCA Bar Association should undertake for its members?

High quality educational programs should be our top priority. I also hope we can have a law review-type bar association journal to fo-

cus specifically on boards of contracts appeals practices and issues. Another activity our members would appreciate would be to hold periodic local meetings outside the Washington, D.C. area. There are enough BCA judges hearing cases across the country that, with some coordination, they should be able to attend local luncheon meetings. The judges could speak to the local members and share their views on current problems and new developments in government contract law.

We appreciate you taking the time to make yourself available for this interview.

Thank you very much.



THE JUDGE'S CORNER

Ronald A. Kienlen

ASBCA

Government contract disputes involve financial consequences which, while not raising issues of life or personal liberty, impact the pursuit of financial happiness for the government contractor and the taxpayer. The Boards of Contract Appeals assure that there is justice in the disputes process. In the words of Daniel Webster, "Justice is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together." This search for justice is never more poignantly expressed than by the *pro se* contractor, who has a greater impact on the utilization of dispute resolution resources than does the contractor represented by counsel.

The *pro se* case has a significant resource consumption impact, either directly or indirectly, on its own case, on the judge's handling of the decision process, on the government attorney, and on the disposition of the private practitioner's case.

Pro se appellants are fairly good at gathering the facts; they are usually fact witnesses. However, they are not very good at relating those facts to the applicable law. No matter how experienced in commercial business, in



most cases the *pro se* does not have a comparable level of experience in government contracts.

From the *pro se's* perspective, the procedural rules are unfamiliar documents that contain equally unfamiliar terminology. Excessive time is often lost and wasted on the pleadings. It is not unusual for a *pro se* to complain, with some exasperation, that he has no idea of what goes into a complaint. There is "wheel-spinning" and frustration for the *pro se* during this process. The Board is often forced to direct that the initial claim be treated as the complaint. While this does at least allow the process to begin, it generally does not advance issue identification.

The *pro se* usually learns the basics of the discovery process after being served with the first set of interrogatories by government counsel. Because the *pro se* seldom knows the elements of proof and the relevant facts, the contractor's discovery efforts are ineffective. Much of his discovery effort is little more than faster "wheel-spinning."

Even when the *pro se* knows the elements of proof, it is rarely with the understanding that will enable the case to be effectively

presented. Often, hearsay is substituted for first-hand testimony, speculation replaces fact, argument is presented instead of sworn testimony, and self-serving testimony takes the place of testimony of an independent expert.

The *pro se* frequently collects evidence and then recounts the story in the first person, forgetting what the judge really wants to hear is eye-witness testimony, not a sales pitch. Too often, the *pro se* fails to understand that the Board is not holding a hearing merely to evaluate factual presentations, but to determine the truth. It is the norm for a *pro se* to present hours or days of mostly useless testimony. Sadly, much of this preparation and presentation of evidence is wasted time and effort.

The ignorance of the *pro se* imposes a difficult burden on the judge. The judge seeks to perform the judicial duty impartially and diligently, in a manner that upholds the integrity and independence of the decision making process (ABA Model Code of Judicial Conduct (August 1990), Canons 2 and 3).

The system of government contracts is so complicated and the presence of counsel gives the government such an advantage, that the likelihood of justice and fairness in the outcome is often in doubt. The judge cannot have much faith that the *pro se* understands the legal terms of art or judicial process.

It has been my own experience that an arms-length approach to the proceedings by the judge works so significantly to the government's advantage that the process would appear to rubber stamp the decisions of the contracting officer. Warranted or not, passivity on the part of the judge in a *pro se* case is destined to create the impression of partiality towards the government.

To ensure a sense of fairness and some assurance that the issues are fairly presented, the judge simply must get involved. Of course, the judge maintains objectivity, but the judge certainly will raise issues, explain the nature and kinds of evidence that are relevant, and may even engage in additional lines of questioning. The purpose of this involvement is to

ensure that the issues can be fairly decided. This involvement absorbs time and energy that judges would rather spend elsewhere in the dispute process.

The *pro se* case also imposes extra burdens on the government attorney, including an ethical dilemma. The ABA Model Rules of Professional Conduct (1983, as amended thru 1992) require that an attorney be especially careful not to mislead a *pro se* contractor. "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding" (Rule 4.3).

Those rules may not be technically binding on all government counsel, but a similar version must certainly be in the rules of every state bar. In 1987, the Judge Advocate General of the Army promulgated a set of rules applicable to the conduct of all uniformed and civilian Army attorneys. Those rules are based on the ABA Model Rules of Professional Conduct

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(124 Mil.L.Rev. 1, Spring 1989). One Board is considering making the ABA Model Rules applicable to those who practice before it.

My own experiences convince me that most government attorneys dislike dealing with a *pro se*. Usually the attorney ends up explaining the Rules of Procedure to the *pro se*. If the government attorney has fairly explained the

Rules, the *pro se* invariably begins to treat the attorney more as an impartial arbitrator than an advocate.

The government attorney then must be sure that the *pro se* clearly understands that the attorney is not impartial; rather, that the attorney is a very partial advocate for the Government or contracting officer. All of a sudden, it's a *Jekyll-and-Hyde* situation: one that is difficult, and in most cases it is a very time consuming process for government attorneys.

My experiences as a trial attorney for the government were that the judges were more likely to give a *pro se* appellant its day in court than they would an appellant represented by counsel, even in circumstances where summary judgment should have been granted. In the mid-seventies, I was admonished by a judge that the ASBCA wanted to ensure that it was, and was perceived to be, acting fairly towards contractors, and that was especially true in the case of *pro se* appellants. I had several cases that went to a hearing unnecessarily, and trial time was wasted. The appellant invariably lost, and considerable time was wasted by all. Nevertheless, a sense of fairness and the opportunity for a full hearing was preserved.

I've talked about the negative impact on the use of resources by the *pro se*, the judge, and the government counsel. The resource consumption by the *pro se* has a consequential impact on the cases of private counsel. Those cases are delayed while *pro se* cases are processed and judges struggle with writing the decisions.

What is the extent of the *pro se* situation before the Boards? A recent article reviewed the 1,080 cases reported in the Commerce Clearing House reports for calendar year 1991 ("Representation Before Boards of Contract Appeals," by Marshall Doke, Jr., Vol. 27, No. 4, Public Contract Newsletter, Summer 1992, p. 3). Marshall Doke found that in 257 of those cases, the contractor was not represented by an attorney.

The largest numbers were at the ASBCA and the GSBICA. The GSBICA had 169 contract

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appeal cases, 57 of them without counsel, for 34% *pro se*. (There were also 155 bid protest cases, of which 16% were without counsel.) The ASBCA had 497 contract appeal cases, 124 of them without counsel, for 25% *pro se*. The proportion of *pro se* cases is significant from the perspective of managing litigation and judicial resources.

system. While it is my impression that more small contractors would win their cases, there is no doubt that everyone would benefit from the savings in litigation and judicial resources.

There is one management tool that could be applied by the membership of the BCA Bar Association and would benefit all the participants. That management tool is an active Law-

The system of government contracts is so complicated and the presence of counsel gives the government such an advantage, that the likelihood of justice and fairness in the outcome is often in doubt.

Marshall Doke concluded: "The absence of legal counsel can present special problems to, and additional work for, administrative judges. *Pro se* representation also often presents problems for contractors relating to the burdens of proof and persuasion."

It is a fair approximation to say that most of the *pro se* contractors are small businesses with claims averaging between \$20-40,000. Most of these small businesses are in communities geographically distant from centers of federal contract attorneys. The majority believe that they cannot afford an attorney or simply cannot find one who knows anything about federal contract law. Nearly all of them seem to think they have very good cases. Few are aware of the Equal Access to Justice Act.

Most of them would benefit enormously from good litigation counsel, either by greatly improving the quality or their case or by quickly settling or abandoning their claim. Most of these cases are not difficult. Few need great litigators. Most would benefit greatly from good trial lawyers. The identification of relevant facts, the application of the law to those facts, and the presentation of evidence through appropriate direct and cross-examination by knowledgeable counsel would do wonders for reducing the resource impact on the current

yer Referral and Information Service (LRIS). An LRIS would serve to "support and improve the administration of justice in the Boards of Contract Appeals of the Federal Government." (See Section 1.2(1) of the BCA Bar Association Constitution.)

Suggestions for the characteristics of such an LRIS can be gleaned from the report of the ABA Standing Committee on Lawyer Referral and Information Services (LRIS). It reported on a 1990 survey of lawyer referral programs in which there were 97 responses. Most (85.6%) of the LRIS have panels arranged by subject matter. In a majority of the subject matter panels (21.7%), a member would have to demonstrate some expertise in the subject matter area. Most of the panels (81.5%) do not provide assistance to clients who intend to represent themselves. Most of the LRIS charge the panel attorneys an annual fee.

Some LRIS operate with committees, some have full time staffs, and some use answering services. A majority require that panel members be members of the organization sponsoring the LRIS. In most cases, however, not all the members of the sponsoring organization are members of the LRIS.

BCA Judge Updates

The BCA Bar Association congratulates Judge Stephen Daniels, who was recently appointed chairman of the GSBCA.

Judge Carroll C. Dicus, Jr. (previously with the NASA BCA) joined the ASBCA on February 7th. On the same day, Terrence S. Hartman was also appointed to the ASBCA. Members should update their Directory accordingly.

Various referral methods are used: some use next-on-the-list basis; some use the office location basis; some use subject matter basis; some use the amount of the attorney's fee basis; and some use a combination. Referrals are handled by telephone, in person, and by mail. In 88.7% of the cases, a client is only given the name of one attorney when making a referral. In addition to the telephone and newspaper ads, many (30.9%) obtain publicity by posters in the courthouse to promote the LRIS.

The BCA Bar Association should consider sponsoring a Lawyer Referral and Information Service.

Legislation & Regulations Committee

Ty Hughes

KING & SPALDING

The Legislation and Regulations Committee held an organizational meeting on February 2, 1993. Those attending agreed to begin the following projects:

- Review the proposed changes to the GSBCA Rules of Procedure.
- Review recent proceedings of the Administrative Conference of the U.S. to identify issues of interest to the BCA Bar Association.
- Review the Report of the Acquisition Law Advisory (Section 800) Panel concerning a single bid protest forum, and prepare comments.
- Collect and compile administrative data concerning appeals heard under the Contract Disputes Act of 1978 by the various agency boards.
- Review and comment on the new GSBCA Charter.

The Legislation and Regulations Committee plans to meet every six weeks in Washington, D.C. We welcome your participation and ideas for committee activities. If you are un-

able to attend in person, you may participate by conference call.

Mark your calendar now for the following meetings: April 20, June 1, and July 13. Meetings will be held at 8 a.m. on the 12th floor of 1730 Pennsylvania Avenue (across the street from the Old Executive Office Building). By Metro, get off at the Farragut West stop and exit at 17th Street.

Practice & Procedures Committee

Carl Peckinpaugh

AKIN, GUMP, STRAUSS, HAUER & FELD

The Practice and Procedures Committee meets monthly to discuss current issues in Board practice. In addition, the Committee has several ongoing projects which are intended to promote quality and professionalism in BCA practice. All interested BCA Bar Association members are invited to participate in any of these activities.

(1) Focus groups

The Committee is sponsoring a series of focus group meetings at which small groups of Board judges and attorneys can discuss current issues outside the confines of a particular case. The first of these focus group meetings, scheduled for March 1993, will address discovery, including norms of attorney conduct in cooperative discovery, and the role of the judge in facilitating discovery. At the next focus group session, we expect to address what the parties hope to see in a Board decision, including such issues as findings of fact, treatment of protected material, and overall length.

(2) Trial advocacy course

Our group will be cosponsoring with the American Bar Association a one week Trial Advocacy Course on trying a case before a Board of Contract Appeals. The date for the course has not been set, but it is likely to be late 1993 or shortly after the first of the year.

(3) Practice manual project

A subcommittee is working on a long-term project to develop a Manual for Practice before the Boards of Contract Appeals. It is expected that the Manual will help the practitioner with respect to both procedural issues that cut across all BCAs and some of the unique aspects of practice before each of the individual Boards.

(4) Informal dispute resolution

A subcommittee is collecting information on the experience to date with Alternate Dispute Resolution (ADR) and other informal mechanisms for resolving or streamlining cases at the Boards. This project can be used as the basis for future position papers, reports, or lecture materials, as appropriate.

(5) Monthly meetings

The Committee will meet on Tuesday, April 27, 1993, and Tuesday, May 25, 1993. Committee meetings are planned for 12:00 until 1:30 p.m. at the offices of Akin, Gump, Strauss, Hauer & Feld, L.L.P., 1333 New Hampshire Avenue, N.W., 5th Floor, Washington, D.C. 20036.

If you are interested in attending the meetings or helping with any of these projects, please call Carl Peckinpaugh, Practice and Procedures Chair, at 202-887-4521, or Don Suica, Practice and Procedures Vice Chair, at 202-401-4062.

do on a regular basis is to track down articles, presentations, and books that have dealt with a particular topic and list them for you. Such a bibliography will be useful either in case preparation or provide a quick reference for a speaking or writing assignment. I will try to select a topic that is so specific that the list of articles is not so voluminous as to be worthless. For

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1993 Annual Meeting

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[EDITOR'S NOTE: FOR THOSE OF YOU WHO DID NOT GET THE HUMOR IN THE EDITOR'S COLUMN, JIM IS WELL KNOWN IN THE BCA BAR AS THE FORMER EDITOR OF OUR NEWSLETTER FOR MANY YEARS.]

There is a great deal of writing (some scholarly, some purely practical) that will interest members of the Association. What I plan to

example, picking the topic of terminations for default in general would be useless because the list of articles that have appeared on that subject would go on for pages. (One bibliography I prepared regarding the Truth in Negotiations Act ran four printed pages. 20 Pub.Cont.L.J. 242, 245-248, 1991.)

As you review my bibliographies, I would appreciate it if you would let me know of any sources I have missed so we can update our readers.

The first topic I have chosen really goes to the heart of the BCA Bar Association—selecting a forum for contract disputes:

Anthony, *Court or Board: A Contractor's Alternative*, 31 Fed.B.News & J. 115 (1984).

Comodeca and Watson, *Forum Selection: Claims Court versus Boards of Contract Appeals*, Vol. II, No. 4, BCA Bar Assoc. News., Winter 1992, at 13.

Kinlin, *Boards of Contract Appeals vs. Claims Court: Which Forum Should You Select?*, ABA Annual Meeting, Atlanta, August 12, 1991.

Schaengold, Brahms, Lerner, *Choice of Forum for Contract Claims: Court v. Board*, Federal Publications Briefing Paper (November, 1992).

Springer, *Choice of Forum from a Contractor's Perspective*, 37 Am.U.L.Rev. 1237 (1988).

On a related topic, see Doke, *Representation Before Boards of Contract Appeals*, 27 Pub.Cont.News No. 4, Summer 1992, at 3, regarding how the representation issue is handled so differently at the boards than the Court of Federal Claims.



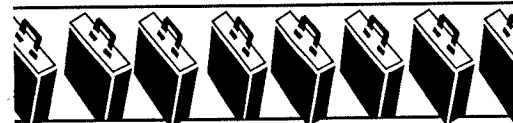
TREASURER'S REPORT

Laura Kennedy

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON

BOARDS OF CONTRACT APPEALS BAR ASSOCIATION STATEMENT OF FINANCIAL CONDITION FOR THE FISCAL QUARTER ENDING 31 MARCH 1993

Beginning Cash Balance, 31 Jan 1993	\$12,954.73
Fund Income	
Membership dues (new members) ¹	- 475.00
Annual Meeting (late payments)	365.00
Total Fund Income	+ 840.00
Fund Disbursements	
Newsletter (Winter)	2,357.03
IRS (application fee) ²	150.00
Total Fund Disbursements	- 2,507.03
Ending Cash Balance	\$11,287.70



(continued from page 1)

tive Evidence, and Practice and Procedure Roundtable.

As you will see from Ty Hughes' column, the Legislation and Regulations Committee is also getting organized and has completed some initial projects, including an analysis of the proposed GSBCA Rules revisions (see Feature Article, p. 13). Both this Committee and the Practice and Procedures Committee would benefit from additional participants. Please contact the committee chairs if you are interested and willing to work on a committee. We also need additional help on the Trial Practice Course.

There is plenty of work for this Association. We hope to hear that increasing numbers of members are becoming involved.

1. THE BCA BAR ASSOCIATION'S FISCAL YEAR RUNS FROM OCTOBER 1ST TO SEPTEMBER 30TH. ANNUAL DUES NOTICES WILL BE MAILED WITH THE JULY ISSUE OF "THE CLAUSE," PAYABLE NLT SEPTEMBER 30TH. INDIVIDUALS NOT PAYING THEIR ANNUAL DUES WILL BE DROPPED FROM THE MEMBERSHIP LIST APPEARING IN THE 1994 DIRECTORY.

2. TO GREATLY REDUCE OUR MAILING COSTS, THE ASSOCIATION IS APPLYING FOR A NON-PROFIT MAILING PERMIT FROM THE POSTAL SERVICE. THIS CANNOT BE OBTAINED UNTIL THE IRS RENDERS A DETERMINATION THAT WE ARE A NON-PROFIT ORGANIZATION UNDER THE INTERNAL REVENUE CODE. WE HAVE FILED FORM 1023, "APPLICATION FOR RECOGNITION OF EXEMPTION UNDER SECTION 501 (c)(3) OF THE INTERNAL REVENUE CODE," WITH THE IRS AND EXPECT A FAVORABLE DETERMINATION.

Proposed GSBCA Rules Revisions



Deneen J. Melander
FRIED, FRANK, HARRIS,
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James A. Hughes,
Jr.
KING & SPALDING



ON DECEMBER 23, 1992, THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS (THE "GSBCA") PUBLISHED PROPOSED REVISIONS TO ITS RULES OF PROCEDURE AT 56 F.R. 60783 (DECEMBER 23, 1992). COMMENTS WERE DUE ON THESE PROPOSED RULES BY FEBRUARY 12, 1993. NUMEROUS ORGANIZATIONS SUBMITTED COMMENTS ON THE PROPOSED RULES, INCLUDING THE AMERICAN BAR ASSOCIATION SECTION OF PUBLIC CONTRACT LAW AND THE FEDERAL BAR ASSOCIATION.

THE GSBCA'S PROPOSED RULE REVISIONS provide needed clarification to otherwise ambiguous rules, and announce rules of practice previously disclosed only through docketing orders or conference memoranda. The revisions should make practice before the Board more consistent and easier for those who do not normally practice before that forum.

The revisions fall into nine basic categories: timeliness of pleadings; motions practice; settlement conferences; sanctions; discovery; hearing procedures; dismissals; relief; and award of costs. This article will attempt to summarize the major revisions in each of these categories, and compare the revised rules to the Rules of the Armed Services Board of Contract Appeals (the "ASBCA") in the case of appeals and to the GAO regulations in the case of bid protests.

A. TIMELINESS OF PLEADINGS

The proposed rules revisions clarify that filing of any material (except a notice of appeal — whose filing rules remain essentially unchanged — or an application for costs) occur "upon receipt by the office of the Clerk of the Board during the Board's working hours." Proposed Rule 1(b)(5)(i). The rules further announce that the Board's working hours are

from 8:00 a.m. to 4:30 p.m. Proposed Rule 1(b)(15). Facsimile transmissions are expressly permitted. However, filing does not occur until receipt of the entire document. Proposed Rule 1(b)(5)(ii).

The rules with respect to service of process in appeals remain unchanged. In the case of protests, however, there is a significant change. When a party files any document with the Board, the proposed rules require service on all other parties "by means reasonably calculated to effect delivery on the same day the document is filed with the Board." Proposed Rule 3(b)(2). Under the current rules, service is required within one day of filing with the Board.

By contrast, the ASBCA's Rules neither disclose how filing of documents (other than a notice or appeal) is accomplished, nor state the ASBCA's hours of operation (8:00 a.m. to

4:30 p.m.). The ASBCA's Rules also do not provide for filing by facsimile transmission.

The GAO's bid protest regulations, on the other hand, define filing as receipt by the GAO prior to its closing time of 5:30 p.m. 4 C.F.R. §21.0(e),(g). The GAO also permits filing by facsimile transmissions and, like the GSBCA, will not consider a document filed until the entire document has been received. However, its rules with respect to facsimile transmissions are not set forth in its regulations, but are attached to its Acknowledgments of Protest.

Another difference between the GSBCA's proposed rules and the GAO's regulations concerns service. At the GAO, the service required depends upon the document being filed. In some cases, service must be within one day (e.g., protests). In other cases, service upon parties must be simultaneous with the GAO fil-

ing (e.g., request that particular documents be excluded from the GAO's protective order).

A final GSBCA proposed rule change concerns the amendment of pleadings. A protester or intervenor would be allowed only five working days to amend its pleadings to add an allegation once the basis for that allegation is known or should have been known. Proposed Rule 7(f)(iii). Under prior practice, protesters and intervenors have had ten working days to amend their pleadings. Similarly at the GAO, protesters have ten working days to file a supplemental or new protest once additional grounds for protest become known. It is unclear whether the proposed rules revision would prevent a protester or intervenor from filing an entirely new protest at the GSBCA based on new grounds after the five working days have expired, but within ten working days of the date when the grounds for protest were known or should have been known. If such a prohibition was intended, the proposed rule revision would conflict with the GSBCA's existing rule permitting the filing of protests within ten working days. See GSBCA Rule 5(b)(3). In any event, this revision, unlike most of the other proposed rules revisions, may add confusion rather than clarification to the Board's practice.

B. MOTIONS PRACTICE

The GSBCA's proposed rules revisions clarify the fact that motions for summary judgment may be made in protests. Proposed Rule 8. Although allowed in practice, the rules currently are ambiguous on this matter. The revised rules also set forth specific time periods in which responses to motions must be filed: within three days in a protest and within twenty days in other kinds of cases. Proposed Rule 8(f).

Proposed rule 8(g) provides that a party opposing a motion for summary judgment cannot simply rely on mere allegations or denial of the adverse party's allegations. A party opposing a motion for summary judgment must set forth specific facts, by affidavit or other-

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RECORDER:

Elaine Hillard

wise, showing there is a genuine issue of material fact.

The ASBCA's Rules, by contrast, do not specifically identify the types of motions that may be submitted. The Rules state only that the Board will entertain "appropriate motions." ASBCA Rule 5(b). The Rules do not specifically permit responses to motions or include any particular time frame for receipt of responses. All such matters are left to the discretion of the Board. GAO's regulations make no provision for the submission of summary judgment motions.

C. SETTLEMENT CONFERENCE

Unlike the ASBCA's Rules and GAO's regulations, the GSBCA's revised rules would include an express provision for Alternative Disputes Resolution. If the parties and the Board agree, a "Board Neutral" or the panel chairman may be requested to conduct the agreed-upon proceedings. The protest may be suspended for a short period while the parties attempt to resolve the dispute, but the statutory time limit for deciding the case will not be tolled. Proposed Rule 10(a)(6), 10(d).

D. SANCTIONS

One of the most significant changes proposed by the GSBCA involves sanctions. Under the proposed rule revisions, all parties appearing before the Board would be required to "adhere to the American Bar Association Model Rules of Professional Conduct." Proposed Rule 18(a). The Board would also have authority to impose sanctions affecting both cases and individuals. With respect to cases, the Board would have the authority to impose sanctions if a party failed to comply with any direction or order issued by the Board, or if the party engages "in misconduct affecting the Board, its process, or its proceedings." Proposed Rule 18(b).

Sanctions the Board may impose in cases include negative inferences, prohibiting the introduction of evidence, striking out pleadings, or dismissing the case. With respect to indi-

viduals, the Board would have the authority to convene a panel and conduct proceedings against an individual who has allegedly violated an order or standard of the Board (including the ABA's Model Rules). Proposed Rule 18(c). Sanctions the Board may impose against individuals include "admonishment, disqualification from a particular matter, referral to an appropriate licensing authority," and "suspension or revocation of the right to practice before the Board."

Neither the ASBCA nor the GAO, by comparison, imposes a standard of conduct such as the ABA's Model Rules. Moreover, neither the ASBCA nor the GAO includes as detailed a description of the types of sanctions that may be imposed as do the proposed GSBCA Rules.

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Beatrice Jones x0116

The nine members of the BCA Bar Board of Governors serve staggered three-year terms. Each year, the terms of three members expire and three new members are elected to replace them (see Section 4.5, BCA Bar Association Constitution).

Elections coincide with the annual meeting in October.



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The ASBCA's Rules contain a single sentence concerning sanctions: "If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal." ASBCA Rule 35. GAO's regulations regarding sanctions appear to be limited to instances where the agency fails to

BCA Bar Association Board of Governors

provide required or requested documents. See 4 C.F.R. §21.3(i).

Sanctions have been a troubling issue for the Board. In *International Technology Corp.*, GSBGA No. 10056-C (10010-P), 90-1 BCA ¶22,341, the Board announced that it can and will, in appropriate circumstances, impose sanctions — including awards of reasonable attorney fees and other costs — against parties and attorneys who litigate in bad faith. The Board dismissed a protest as frivolous after finding that the protester failed to comply with the letter and spirit of the Board's discovery order. *VION Corp.*, GSBGA No. 10218-P, 90-1 BCA ¶22,287.

The Court of Appeals for the Federal Circuit reversed the dismissal and held that Congress gave the Board limited authority under 40 U.S.C. §759(f)(4)(C) to dismiss frivolous protests and protests that, on their face, fail to state a valid basis. The court specifically held that the Board did not have the authority to dismiss a protest brought in bad faith. *VION Corp. v. U.S.*, 906 F.2d 1564 (Fed. Cir. 1990), amended by unpublished errata (Aug. 21, 1990). A bill introduced last term by Congressman Conyers, but not enacted, would have allowed the GSBGA to dismiss frivolous or bad faith protests, and to assess costs when a party fails to comply in good faith with an order of the Board. Similar bills are expected to be introduced this year.

While the Board's efforts to detail its sanction authority are commendable, the adoption of the ABA Model Rules could create conflicts with local rules of conduct. In addition, some confusion may result from the Board's undefined use of the term "misconduct." Legislation giving the Board specific authority to impose sanctions may solve this problem and obviate the need to incorporate the ABA Model Rules by reference.

E. DISCOVERY

Under the proposed changes to Rule 15(d), discovery will only be available to the

extent incorporated in a discovery plan approved by the Board. In the past, the requirement for a discovery plan applied only to protests. Unless the Board issued an order to the contrary, the parties to a contract appeal were free to engage in discovery subject to the time for response contained in Rule 17.

The proposed rules provide additional clarity to various discovery procedures. Specific time frames are set for filing objections to discovery requests: two working days after receipt in protests and ten working days after receipt in other kind of cases. Proposed Rule 15(f)(2). In protests, the time for answering written interrogatories has been reduced from ten days to five working days. Proposed Rule 17(a). The revised rules also place a continuing obligation on parties who have responded to written interrogatories to supplement their responses when they become aware of additional responsive information. Proposed Rule 17(f). In addition, parties can no longer submit a subpoena to the Board in blank without the approval of a judge. Proposed Rule 20(d).

This revised practice would be significantly different from practice at the ASBCA. At the ASBCA, written interrogatories may be answered or objected to within 45 days after service. ASBCA Rule 15. There also is no imposition of a continuing obligation to supplement answers. There is no provision for written interrogatories at the GAO.

F. HEARING PROCEDURES

The primary change with respect to hearing procedures in the revised GSBCA rules is the elimination of hearing examiners. See GSBCA Rule 18. This change will make the GSBCA consistent with the ASBCA which also has no provision for the use of hearing examiners.

The small claims and accelerated procedures under Rules 13 and 14 have been extensively rewritten. Proposed Rules 13 and 14 provide that the Board will establish a schedule

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of proceeding in each case designed to allow timely resolution of the appeal.

The proposed GSBCA rules revisions clarify that protests may be voluntarily dismissed. Proposed Rule 28(a). The revised rules also state that protests that are dismissed without prejudice will be converted to dismissal with prejudice unless reinstated within ten working days of the date of dismissal. In any other kind of case, the dismissal without prejudice will be converted to a dismissal with prejudice unless reinstated within 180 calendar days of the date of dismissal. Proposed Rule 28(e).

The ASBCA's Rules, by contrast, allow a period of three years for reinstatement of case that are dismissed without prejudice. ASBCA Rule 30. GAO's regulations do not contain any express provision concerning dismissal without prejudice.

G. RELIEF

The proposed GSBCA rules limit the time in which a party may request full board consideration to a period within ten working days after receiving a panel's decision on reconsideration. Proposed Rule 30. The rule currently indicates that full board consideration can be requested at any time. Under the revised rules, only a judge can request full board consideration at any time. The decision to grant full board consideration would require a majority vote of the Board. Proposed Rule 30(b). Neither the ASBCA nor the GAO have a similar provision for full board consideration.

H. AWARD OF COSTS

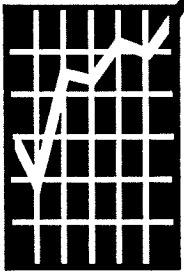
Proposed changes to Rule 35 provide detailed guidance concerning applications for the award of costs under the Brooks Act, 40 U.S.C. §759(f), and the Equal Access to Justice Act, 5 U.S.C. §504. A party seeking costs may submit an application within thirty calendar days of a final disposition in the underlying protest or appeal. A Board decision becomes final when it is not appealed to the United States Court of Appeals for the Federal Circuit

within the time permitted. If appealed, a Board decision becomes final when the time for petitioning the Supreme Court for certiorari has expired. A protest or appeal that is granted as a result of a settlement becomes final when the Board enters an order granting the protest or appeal.

Applications for costs must include an exhibit fully documenting claimed fees and expenses. Claims for professional services must show the date, description of services, and time spent by each individual. Except for claims for bid and proposal preparation, applications will be made publicly available.

Applications for costs must be signed by the applicant or the applicant's attorney. The application must contain a verification under oath that the information provided is "true and correct." Under proposed Rule 35(c)(3), the Board may require the applicant to provide supporting data and to submit to a Government audit of the claimed costs.

(charts continued on page 24)



ACCOUNTANT'S CORNER

What IS an Environmental Cost?

Peter A. McDonald

DELOITTE & TOUCHE

It appears that the draft environmental cost principle is likely to become the final rule¹. Based upon the most recent information available to the author at the time of this writing, at most only minor non-substantive revisions in the final rule are anticipated. For both contractors and contracting officers, this is unfortunate because the proposed cost principle is certain to promote confusion among accountants and auditors alike. Many erroneously think that an environmental cost is any expense caused by or related to an environmental matter, but the draft cost principle actually makes that determination quite difficult. With this in mind, the question about which expenses are environmental costs is worthy of careful examination.



Environmental costs are divided into two categories: compliance costs and remediation costs (also called clean-up costs)². However, before a proper classification can be made, the nature and purpose of the particular expense must be carefully considered.

Environmental costs are defined in subparagraph (a) of the proposed regulation as follows³:

- (a) Environmental costs -
 - (1) Are those costs incurred by a contractor for:
 - (i) The primary purpose of preventing environmental damage; properly disposing of waste generated by business operations; complying with environmental

- laws and regulations imposed by Federal, State, or local authorities; or
- (ii) Correcting environmental damage.
- (b) Environmental costs in paragraph (a)(1)(i) of this subsection, generated by current operations, are allowable, except those resulting from violation of law, regulation, or compliance agreement.

The first category, (a)(1)(i), encompasses compliance costs, prevention costs, and disposal costs. Remediation costs fall into the second category, (a)(1)(ii) ("correcting environmental damage").

Subparagraph (b) of the proposed regulation makes costs falling under first category allowable, except "those resulting from a violation of law, regulation, or compliance agreement⁴." Subparagraph (c) makes costs under the second category (i.e., remediation costs) generally unallowable, which means that those expenses are paid with profits.

Obviously, it behooves contractors to maximize their costs under the first subparagraph and minimize their costs under the second. But in this murky area, a government contractor's chief financial officer (CFO) can easily construe certain facts to reach a conclusion that is diametrically opposite to the one made by an auditor from the Defense Contract Audit Agency (DCAA). In short, the correct treatment of environmental expenses can present very difficult accounting questions, more so than is generally appreciated.

The determinations accountants make in exercising their professional judgment (consistent with the FAR cost principles, the Cost Accounting Standards, and generally accepted accounting principles) report the financial results of an enterprise. These judgments translate complex business operations of a period into a structure of accounting records, upon which that period's financial statements are based. The profitability, creditworthiness, and indeed, the viability of a business, is based on these financial statements.

It is not difficult to incur an environmental liability these days. Being cited as a potentially

responsible party (PRP) carries joint and several liability with it. Irrespective of the nature and extent of the contamination, unallowable remediation costs can be substantial⁶.

There is a direct and immediate, dollar-for-dollar relationship between cost disallowance

and profit. No matter how well a business performs in any particular facet in the production of its goods and/or services, it must make a profit. In a competitive market, a company may even cease to exist if it remains only marginally profitable. For large companies,

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unallowable remediation costs may mean only diminished profits, but for those many companies lacking the same depth of resources, a sizable remediation cost can mean bankruptcy.

With all of the above as backdrop, let's critically examine some illustrative expenses.

Assume a contractor pays an engineering firm to perform a study of its property to ascertain whether any contamination exists and, if so, its extent. Is the cost of this study an allowable compliance cost or an unallowable remediation cost?

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The answer is that more facts are needed. A state or local inspection may have been the first indication the company had that its property did not comport with applicable environmental requirements. Hence, it was complying with those requirements when it paid for the survey. Under these circumstances, the CFO could conclude that the survey should be an allowable compliance cost. However, if the study was undertaken in response to a finding of noncompliance from a state or local inspection (where the majority of environmental enforcement occurs), a DCAA auditor could determine that there was a "violation" under (a)(1)(i), or the study was but the first step in a remediation process under (a)(1)(ii). Either way, the auditor could conclude that these costs should be unallowable. Other facts about the circumstances under which this expense was incurred could easily sway the final determination one way or the other.

Assume a second scenario in which a contractor conducts an environmental assessment of its extensive property with its own qualified employees, during which it is discovered that hazardous waste was illegally dumped on its land by person(s) unknown. The contractor hires a licensed hazardous waste transporter to take the waste to a licensed high-temperature incinerator (one of the few). Are these costs allowable as compliance costs under (a)(1)(i)? Surprisingly, both the cost of transporting the hazardous waste and the disposal facility's cost could be unallowable. The draft regulation unambiguously states that compliance costs are allowable "except those resulting from violation of law, regulation, or compliance agreement." The inartfully drafted regulation does NOT require the violation to be by the affected government contractor/property owner. It only requires a "violation of law." Because the given facts state that the dumping was illegal, a DCAA auditor could determine that the transportation and disposal costs should be classified as remediation costs and, absent other facts, unallowable.

Consider a third scenario (it gets worse). A government contractor that stores hazardous waste left over from previous contracts on its property is very anxious to avoid a spill. For that reason, it purchases double-hulled containers and builds reinforced above-ground racks. Are the costs of either the containers or the racks allowable? Unfortunately, it would seem that they are not. Obviously, they are not remediation costs because there is no contamination being cleaned up. However, to be allowable subparagraph (b) requires prevention costs under (a)(1)(i) such as these to be "generated by current operations." In this case, the hazardous waste is the excess from previous government contracts. Because the costs of these preventive measures does not meet the "generated by current operations" criterion, they are not compliance costs either. Accordingly, under the proposed regulation they appear not to be an environmental cost at all.

Assume the following facts in a fourth scenario (it gets even worse). A manufacturer creates hazardous materials as a by-product in the performance of a government supply contract, i.e., the "current operations" test is met. There is no commercial application for this material and there are no disposal facilities anywhere nearby. It hires a subcontractor to remove and dispose of the hazardous materials. The subcontractor transports the waste unmarked four states away and dumps it at an unauthorized site. Investigative reporters discover this activity, and a public outcry ensues. In the subsequent enforcement actions, the manufacturer is cited as a PRP. Are the manufacturer's hazardous waste subcontract costs allowable?

Under the draft regulation as presently worded, the answer is uncertain. The CFO may legitimately argue that the hazardous waste was properly disposed of when the manufacturer incurred the expense of hiring a subcontractor to dispose of the waste material. From this point of view, the allowability of the expense arises from a transactional event. On the other hand, a government auditor may de-

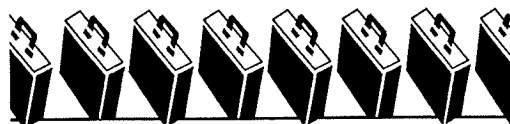
cide that the costs should be unallowable because (a)(1)(i) only applies to costs in "properly disposing of waste generated by business operations." Because the waste was not properly disposed of, the subcontractor's costs should not be allowable. Under this interpretation, the allowability of the expense turns on an actual event (i.e., the disposal itself). In other words, the creator of hazardous waste under a government contract should not be permitted to pass its disposal costs to the government until that waste is in fact properly disposed of. To the auditor, this expense does not meet the criteria for either a compliance cost or a remediation cost, and is therefore not an environmental cost at all. From this example, it would seem that cost allowability turns on what "properly disposing of waste" requires, a transaction or a disposal. At present, there is no law on this point⁶.

Consider a final scenario. A contractor is concerned that its employees are not adequately mindful of their environmental responsibilities. To remedy this shortcoming, management hires an expensive consultant to train its work force on the applicable Federal, state and local environmental laws and regulations. Employees are cycled through a five-day training session, and after ten weeks all employees are trained on what the laws provide. Is the cost of this training allowable? Again, the answer is uncertain. The contractor's CFO could reason that the training was for the "primary purpose of preventing environmental damage" under (a)(1)(i), and is therefore allowable. The government auditor may disagree though, because acquainting all employees with what the environmental laws provide is not the same as taking specific measures to prevent environmental damage. Moreover, it may not be necessary to train all employees on environmental laws as only management and key personnel require such training. Also, it is doubtful whether the need for such company-wide training may have been "generated by current operations." For

all of these reasons, the government auditor may maintain that these training costs are not compliance or remediation costs at all, and in fact are not environmental costs at all. Lastly, under the given facts these costs would not meet the allowability criteria in FAR 31.205-44 (Training and Education Costs) either.

Here again, there is no law on this point, so the resolution of this question is unclear. More detailed facts would undoubtedly influence the outcome.

As seen in these few simplistic examples, the distinctions between compliance costs and remediation costs, and what an environmental cost is and is not, are matters about which knowledgeable people in good faith can (and surely will) reasonably differ.



Endnotes

1. FAR 31.205-9.

2. SEE "GORDIAN KNOT REDUX: ENVIRONMENTAL COSTS FOR GOVERNMENT CONTRACTORS," BY SCOTT ISAACSON AND PETER McDONALD, BNA FEDERAL CONTRACTS REPORT, VOL. 57, No. 22, JUNE 1, 1992.

3. FOR THE COMPLETE TEXT OF THE DRAFT ENVIRONMENTAL COST PRINCIPLE (FAR 31.205-9), SEE BNA FEDERAL CONTRACTS REPORT, VOL. 57, No. 18, MAY 4, 1992.

4. BY USING THE TERM "RESULTING FROM A VIOLATION," IT WOULD APPEAR THAT A SHOWING OF CAUSATION BETWEEN THE TRANSGRESSION AND COMPLIANCE, PREVENTION OR DISPOSAL COSTS IS REQUIRED FOR COST DISALLOWANCE.

5. "NO EXIT: MASS LIABILITY SUITS CAN TRAP MINOR PLAYERS THAT PREFER TO SETTLE," BY EDWARD FELSENTHAL, WALL STREET JOURNAL, P. 1, JANUARY 4, 1993.

6. THE IRS RECENTLY RULED THAT FOR TAX PURPOSES, SOIL REMEDIATION COSTS OF AN ACTIVE FACILITY MUST BE CAPITALIZED.

GSBCA Rule		Now	Proposed
1(b)	Filing	<ul style="list-style-type: none"> Filing occurs when received by the Office of the Clerk during the Board's working hours. Appeals are filed by submitting a written notice of appeal to the contracting officer or HCA, physical mailing, or transmission of a telegram. 	<ul style="list-style-type: none"> Filed when received by the Office of the Clerk during the Board's working hours (8:00 a.m. - 4:30 p.m. Rule 37). Permits facsimile filing to Board and the parties but cautions that unavailability of facsimile machine will not extend time for filing. See Rule 5(b) below. Provision for filing appeals by telegram deleted.
2(c)	Computing Time	<ul style="list-style-type: none"> Saturdays, Sundays, and federal holidays are not included in computing time for Board imposed deadlines of seven days or more (with several exceptions). 	<ul style="list-style-type: none"> Clarifies computation of time. Number of exceptions has been reduced. Saturdays, Sundays, and federal holidays are not included in computing time for board imposed deadlines of less than eleven days (except for the ten day period when filing a protest that requests a suspension hearing). Days on which the Board closes before 4:30 p.m. or closes for an emergency or inclement weather are not counted as the final day for the purpose of filing.
3(b)	Service	<ul style="list-style-type: none"> Appeals -- By mail. Protests -- When filed with the Board (and all parties within one day). 	<ul style="list-style-type: none"> Appeals -- No change. Protests -- When filed with the Board (and all parties on the same day).
5(b)	Time Limits for Filing	<ul style="list-style-type: none"> Appeals -- 90 days after receipt of final decision. Protests -- before bid opening or due date for proposals; ten days after denial of agency protest. Intervention -- Four days after receipt of notice. 	<ul style="list-style-type: none"> Appeals -- 90 calendar days after receipt of final decision Protests -- before bid opening or due date for proposals; ten working days after basis for protest is known; ten working days after denial of agency protest. Intervention -- Four working days after receipt of notice Intervention based on an amendment to the protest is limited to the newly-raised issues. Note: Protests seeking suspension must be filed within ten calendar days of award.

GSBCA Rule		Now	Proposed
6	Appearances	<ul style="list-style-type: none"> Businesses may be represented by an officer or authorized representative. 	<ul style="list-style-type: none"> Businesses may be represented by attorney, officer, or employee. A non-attorney consultant <i>cannot</i> represent a business. A person who has filed a notice of appearance may subsequently file a motion to withdraw identifying any successor representative.
7(b)	Amendment of Protest Pleadings	<ul style="list-style-type: none"> At the discretion of the Board (practice has been to allow amendment of pleadings up to ten working after basis is known). 	<ul style="list-style-type: none"> May amend pleadings within five working days after the basis for the additional allegation is known or should have been known.
7(c)	Answer	<ul style="list-style-type: none"> Dispositive motions under Rule 8(c) may be filed in lieu of an answer. 	<ul style="list-style-type: none"> Dispositive motions or a motion for a more definite statement may <i>not</i> be filed in lieu of an answer.
8(g)	Motions for Summary Relief	<ul style="list-style-type: none"> All material facts in the statement by moving party are deemed admitted unless controverted in the statement by opposing party. 	<ul style="list-style-type: none"> Party opposing motion for summary judgment must establish that there is a genuine issue of material fact by affidavits or other evidence.
10	Alternate Disputes Resolution	<ul style="list-style-type: none"> No specific provision. 	<ul style="list-style-type: none"> Parties can agree to appointment of a "Board Neutral" (either a judge or attorney employed by the Board) Parties can request that the panel chairman act as a "Board Neutral"
13	Small Claims Procedures		<ul style="list-style-type: none"> Small claims and accelerated procedures entirely rewritten. Board will establish procedures in each case for resolution within applicable time frame.
14	Accelerated Procedures		
15(d)	Conduct of Discovery	<ul style="list-style-type: none"> Protests -- available only to the extent incorporated into a discovery plan approved by the Board. Appeals -- available unless limited by an order of the Board. 	<ul style="list-style-type: none"> <i>In all cases</i> -- available only to the extent incorporated into a discovery plan approved by the Board

GSBCA Rule		Now	Proposed
17(a)	Interrogatories	<ul style="list-style-type: none"> In protests, answers to interrogatories must be filed within ten days after service; otherwise 30 days. 	<ul style="list-style-type: none"> In protests, answers to interrogatories must be filed within <i>five working days</i> after service; otherwise 30 <i>calendar</i> days.
18	Hearing Examiner	<ul style="list-style-type: none"> Detailed rules concerning the designation and authority of hearing examiners. 	<ul style="list-style-type: none"> Section eliminated in its entirety.
18	Sanctions	<ul style="list-style-type: none"> See rules 10(d) and 15(g). 	<ul style="list-style-type: none"> Attorneys must follow ABA Model Rules of Professional Conduct. Panel of judges may conduct disciplinary proceedings. Sanctions can include disqualification or suspension.
30	Full Board Consideration	<ul style="list-style-type: none"> Not covered. 	<ul style="list-style-type: none"> Full board consideration upon majority vote of the Board's judges.
35	Cost Applications	<ul style="list-style-type: none"> Motion for costs with supporting documentation and certification of accuracy must be filed within thirty days after a decision. 	<ul style="list-style-type: none"> Cost applications must be documented and signed. Applicant must certify that information in cost application is "true and correct." Board may require applicant to provide supporting documentation and/or submit to a Government audit of claimed costs.